

PENNSYLVANIA VICE

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Special to the Law Weekly



LIQUOR LAW

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Why Good Ice Beer Created by U.S. Brewers Is Illegal

In the mid-1990s, the ice beer market went from an esoteric niche reserved for the then-rare beer aficionados to a major branding opportunity for major beer marketers. Ice beer quickly grew to be more than 6 percent of the U.S. beer market.

It also violated American law until the federal government created a carveout that protects “weak ice beer” as made by America’s major brewers.

Because of the idiosyncrasies of how the United States defines and thus regulates beer and liquor, traditional ice bocks, with their dramatically higher alcohol content and fuller flavors, are classified as distilled products and cannot be sold as beer. But this only applies to domestically brewed/distilled products.

WHAT IS ICE BEER?

Ice beer is produced by taking regular beer and cooling it below water’s freezing point. Alcohol remains liquid at temperatures more than 100 degrees below water’s freezing point. Thus, when beer is cooled to sub-zero temperatures, some of the water in the beer becomes ice. By scooping away the ice, or draining off the concentrate, the remaining beer can be returned to normal temperatures with a higher alcohol percentage than when initially brewed.

The process of icing beer also can

draw out impurities and any other liquid that has a water-level freezing temperature, and as a result the beers tend to be smoother. At concentrations below around 15 percent alcohol by volume (ABV), the resulting beer can be rich and flavorful, but otherwise seem very similar to beer. At higher alcohol concentrations, ice beers typically taste and feel thicker — more like a whiskey or brandy than what consumers traditionally think of as beer.

The regulatory issue occurs because making ice beer, at any level of concentration, relies on the process of freeze distilling. Distilled alcoholic products are generally regulated by the laws that apply to hard liquor and not beer.

Although the process of making ice beer goes back generations in Germany and, to a lesser extent, in Canada, ice beers had traditionally been seasonal items produced by brewers who could use natural atmospheric cooling to produce a more intense beer. In the early 1990s, however, Canadian brewers Labatt and Molson began competing to mass market commercial ice beer year-round in Canada. Ice beer quickly grew to almost 10 percent of the Canadian beer market and the American breweries took notice.

ICE BEER IN THE UNITED STATES

Several major American breweries began importing the Canadian ice beers and the American demand for ice beers proved to be substantial, and every major American brewer started looking to produce iced lines of their own major brands.

Unfortunately, while it was legal to import Canadian ice beer — imported beers are regulated differently than domestic ones — the plain language of federal regulations prohibited freeze

distilling by American breweries. The brewers sought relief from the Bureau of Alcohol, Tobacco and Firearms, the entity that regulated beer at that time.

ATF effectively legalized domestic ice beers with a creative formal opinion, Ruling 94-3.

Ruling 94-3 focused on prior federal regulations that dealt with “beer concentrate,” which is an intermediate product created when a brewery concentrated and then reconstituted beer. Beer concentrate usually took the form of a thick sludge and the regulations had been created to address shipping and reconstituting beer for economic reasons in a manner similar to how current distributors use frozen concentrated orange juice.

Ruling 94-3 focused on the substantive difference — the fact that ice beer is more like traditional beer than juice concentrate — to circumvent the express language of the regulations approved through the notice and comment process. After “reviewing” the proposed ice beers, all of which used minimal amounts of icing, the ATF decided that removal of a “small amount” of ice crystals, constituting less than half of one percent of the original amount of beer, would thereafter be treated as beer rather than as concentrate.

With this ruling, the ATF allowed the American brewers to enter into this very profitable market space. Within months, major brands, such as Bud Ice, were on the market and the United States grew a significant market for weak ice beer, which is only minimally more concentrated than the original product.

RECENT REGULATION

The Alcohol and Tobacco Tax and Trade Bureau took over federal beer regulation following a 2003 govern-

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mental reorganization that restructured the functions of the ATF. Today, the TTB continues to apply Ruling 94-3, at least officially, with one notable exception discussed below. The TTB's policy is that it will not approve any ice beer where more than 0.5 percent of the beer is removed through the distillation processes, and it reviews every beer label utilized in the United States and the recipe for every domestic ice beer before it is allowed into official production.

The TTB rules have not necessarily stopped brewers. A search of beer websites for ice beers or eisbock (the primary German variety, where a bock beer is iced) will show a significant number of ice beers being manufactured in the United States, including a few in Pennsylvania, although they have generally only been produced in small quantities for draft distribution. Even this amount of circumvention is unusual — TTB rules are usually followed religiously by commercial brewers and enforced, to the letter, by the TTB.

While they apparently will not speak about it for the record, TTB staff have anonymously told a number of beer writers that they are aware of these brews and are choosing to not enforce the rules against ice beers when they are produced at the craft beer level and sold on draft. Many of these same reports have discussed ongoing efforts inside the TTB to revise the ice beer rules in full through development and issuance of superseding regulations.

REDHOOK EISBOCK 28

While TTB has never approved a label or any other statement for an "ice beer" outside of Regulation 94-3, it did approve a 2010 beer label for a single eisbock, Redhook Eisbock 28. The beer's label, as approved by the TTB, read, "Aged for months at temperatures well below freezing, Eisbock 28 is extraordinarily smooth and malty with a bittersweet complexity achieved by ice processing," according to published reports.

Although Redhook sold out the limited release, it has not released an Eisbock 29 or any other successor beer. Nor does it appear that any other domestic ice beer or eisbock label has been approved by the TTB in the last two years.

The decision to not move forward is

not likely due to financial resources. Although Redhook Brewery was formerly a craft brewer, it was part of a roll-up strategy in 2008 and now is publicly traded and owned 32 percent by Anheuser-Busch InBev, which also has substantial distribution rights. Eisbock 28 was designed as a limited release with 11 percent ABV and even was briefly available in Pennsylvania.

It thus remains unclear what the TTB approval of Eisbock 28's label means. It might have been a beer that sneaked through once, or it might be that the TTB is preliminarily relaxing its rules, even on the labeling side, in advance of a more general relaxation of ice beer rules.

IMPORTING ICE BEERS

Distillation regulations do not apply to foreign manufactured items, which are simply regulated as imports. While the TTB approves labels on imported beers, it does not look at, or regulate, the underlying recipes. That distinction opened the door for the initial Canadian imports and, today, a wide variety of German eisbocks are legally available in the United States. Two eisbocks with moderate alcohol contents are distributed in Pennsylvania — Aventinus Weizen and Kulmbacher.

Ice beer is produced by taking regular beer and cooling it below water's freezing point.

Some brewers, however, have taken ice beers to the extreme, repeatedly re-cooling beers and scraping away more and more ice, ratcheting up the alcohol content at each level. While there have been other players, the battle has focused, for the last several years, on a duel between eisbocks produced by the German brewery Kleinbrauerei Schorschbräu and the Scottish brewery BrewDog. Every time KS pushed the limit, BrewDog would top it, first with 32 percent ABV Tactical Nuclear

Penguin and then, after KS pushed to 40 percent, Sink the Bismarck! with 41 percent ABV.

Despite "leading" the arms race, BrewDog attempted to pre-emptively end the fight by leapfrogging to 55 percent ABV with a brew named End of History. BrewDog announced that it was the furthest it would go in concentrating beers and sold each of the 12 bottles it produced, each wrapped in animal skin, for almost \$1,000 each.

Their effort was not successful, as KS rose to the challenge, producing Finis Coronat Opus at 57.7 percent ABV. However, both participants may have retired from battle, as, like BrewDog, both the name and the associated statements from KS indicate that a more concentrated beer will not be forthcoming.

If TTB changed the rules, Pennsylvania breweries are unlikely to compete with KS and BrewDog. But we would expect to see a significant increase on the number of eisbocks in the market, both on draft at craft bars and for purchase by the bottle. •